



Madhloom, O. (2017). Deceptive Conduct: Recognising a Further Typology of Abuse under Section 76. *Contemporary Issues in Law*, 14(2), 119-140. [3].
<http://www.lawtext.com/lawtextweb/default.jsp?PageID=2>

Peer reviewed version

License (if available):
GNU LGPL

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via [insert publisher name] at [insert hyperlink] . Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Deceptive Conduct: Recognising a Further Typology of Abuse under s. 76

Introduction

Following the introduction of s. 76 Serious Crime Act 2015 this is a timely opportunity to explore the concept of deceptive conduct as a form of criminally controlling behaviour. The offence created under s. 76 applies to coercive or controlling behaviour that has a serious effect on the complainant and takes place in an intimate or familial relationship. The terms coercive and controlling are not defined within the legislation, however, the policy definition adopted in England and Wales illustrates that both are understood to capture a wide range of ongoing activity. It is recognised that abuse in an intimate relationship, occurs particularly where there is an ongoing pattern of submission by one party and control by the other party, using a variety of methods.¹ This article will consider the behaviour and harm associated with lying and deceiving applying a moral framework using Kantian ethics. The benefit of this Kantian approach is that it imposes a duty of care and trust between individuals and supports the view that both philosophically distinct concepts of lying and deceiving are capable and ought to be recognized as a form of abuse falling within controlling behaviour. Applying Kantian theory, it will be shown that lying and deceiving have a serious and adverse effect on the individual's autonomy by impacting upon her decision-making process and influencing her will so that she is under the perpetrator's control. In addition, it will be shown that Kantian ethics imposes an obligation on the State to protect individuals from these forms of abuse within intimate relationships. This is

¹ Gordon, M, 'Definitional issues in violence against women: Surveillance and research from a violence research perspective' (2000) 6 Violence Against Women 747

significant when considered in the context of discovered practices utilised by some undercover police officers who formed intimate relationships using false identities, with women as part of policing investigations. This example of lying and deception, it is argued, amounts to a form of controlling behaviour, extending beyond the perpetrating officers to include the state itself and furthering the degree of harm suffered by the victims. Based on the analysis provided in this article, it is advocated that any future use of such policing practices would amount to a criminal offence under s. 76 Serious Crime Act 2015.

The socio-legal conceptualisations of domestic violence have traditionally focused on acts of physical violence.² However, as the core elements of domestic violence were gradually understood as non-physical, they began to be described to include psychological abuse, or patriarchal or intimate terrorism.³ The term ‘coercive control’ is now more commonly used to describe conduct which does not exclusively include physical violence.⁴ One of the earliest definitions of this concept was provided by Stark and Flitcraft:

[A] pattern of coercion characterized by the use of threats, intimidation, isolation, and emotional abuse, as well as a pattern of control over sexuality and social life, including... relationships with family and friends; material

² Stark, E, *Coercive Control: How Men Entrap Women In Personal Life*, (New York: Oxford University Press, 2007); Laing, L, Cavanagh, K, and Humphreys, C, *Social Work and Domestic Violence: Developing Critical and Reflective Practice*, (London: Sage Publications, 2013)

³ Johnson, M. P, *A Typology of Domestic Violence: Intimate Terrorism, Violence, Resistance and Situational Couple Violence* (Boston: Northeastern University Press, 2008)

⁴ *Supra* n 2 and n 3

resources (such as money food, or transportation); and various facets or everyday life (such as coming and going, shopping, cleaning, and so forth).⁵

Thus, the long-term negative impacts of domestic violence on women's economic, physical and mental health and the consequences for children and their life chances is indisputable within contemporary research.⁶ Widening the scope of domestic violence to include coercive control, has resulted in important policy and legal changes.⁷ In 2011 the definition of family violence in the Australian Family Law Act was expanded to incorporate notions of coercion and control (which are not always accompanied by physical violence or threats). Similarly, in England and Wales, s76, Serious Crimes Act 2015, criminalised coercive control in an intimate of family relationship.

This article argues that lying and deceiving, in an intimate relationship, adversely affect a victim's autonomy by limiting her choices and restricting her freedom. This type of conduct is capable of manipulating a victim's decisions, preventing her from exercising autonomy in a manner which is consistent with her own standards, such as when and with whom to engage in an intimate relationship. According to Rubinfeld, 'parties rarely disclose every potentially relevant detail' about themselves to each other.⁸ Although this comment relates specifically to sexual relations, it can be applied equally to intimate relations. The variety of methods by which a perpetrator can tacitly mislead their victim includes purposely omitting information about finances or passing on personal messages. In the early stages of the relationship the perpetrator may deceive the victim about key aspects of their personal life

⁵ Stark, E, and Flitcraft, A, *Women at risk: Domestic violence and women's health* (Thousand Oaks: CA: Sage 1996), 166.

⁶ Pitman, T, 'Living with Coercive Control: Trapped within a Complex Web of Double Standards, Double Binds and Boundary Violations' (2017) 47 *British Journal of Social Work* 143 at 144

⁷ *Ibid* at 144

⁸ Rubinfeld, J, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *The Yale Law Journal* 1372 at 1372.

for example through clothing, applying cosmetics, use of religious symbols and removing one's wedding ring. Autonomy is violated where a perpetrator resorts to such deceptions to procure control over his victim, by limiting her freedom, knowing that his lying and deceiving related to a material fact. Withholding information relevant to an individual, such as the perpetrator's identity, for the purpose of controlling a victim in an intimate relationship, is a violation of the victim's autonomy.

It will be argued that lying and deceiving should be classified as 'controlling behaviour' under the Serious Crimes Act 2015 (the Act), s 76.⁹ Section 76 creates the specific offence of 'controlling or coercive behaviour in an intimate or family relationship' where the victim and the abuser are 'personally connected'.¹⁰ This is not limited to where the perpetrator and the victim are in an 'intimate relationship' but where they live together and 'they are members of the same family',¹¹ or 'they have previously been in an intimate personal relationship with each other'.¹² Thus, s76 addresses the gap in the law surrounding patterns of controlling or coercive behaviour which take place during a relationship between intimate partners, former partners who still live together or family members.¹³ The behaviour must have had a 'serious effect'¹⁴ on V, meaning that it has caused her to fear violence will be used against her on 'at least two occasions',¹⁵ or it has had a 'substantial adverse effect on the victims' day to day activities'.¹⁶ However, a perpetrator must have known that their behaviour would have a serious effect on the victim, or the behaviour must have been such

⁹ Section 76 came into force on 29 December 2015.

¹⁰ Section 76(2).

¹¹ Serious Crimes Act 2015, S 76(2)(b)(i)

¹² Serious Crimes Act 2015, S 76(2)(b)(ii)

¹³ For discussion of the previous legislative gap in the law see Bettinson, V, and Bishop, C, 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence?' (2015) *NILQ* 66, 179

¹⁴ Serious Crimes Act 2015, S 76(1)(c)

¹⁵ Serious Crimes Act 2015, S 76(4)(a)

¹⁶ Serious Crimes Act 2015, S 76(4)(b)

that he or she 'ought to have known'¹⁷ it would have that effect. Under s76(8) it is a defence to show that 'in engaging in the behaviour in question, A believed that he... was acting in B's best interest' and his 'behaviour in all the circumstances was reasonable'.

Controlling or coercive behaviour does not relate to a single incident, it is a purposeful pattern of behaviour which takes place over time designed for one individual to exert power, control or coercion over another.¹⁸ The cross-Government definition of domestic violence and abuse outlines controlling or coercive behaviour as follows:

Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.¹⁹

Coercive behaviour is: a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.²⁰

The definition is supported by an explanatory text:

This definition, which is not a legal definition, includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group.²¹

¹⁷ Serious Crimes Act 2015, S 76(5)

¹⁸ Home Office. *Controlling or coercive behaviour in an intimate or family relationship: statutory guidance framework* (Home Office, 2015) at 3

¹⁹ *Ibid* at 3

²⁰ *Ibid* at 3

The question, therefore, is how to judge situations described above which take place in an intimate relationship? A moral theory must be capable of explaining why lying and deceiving should be considered as controlling behaviour. Liberal retributive principles require that only conduct which is blameworthy can legitimately be subject to state punishment.²² Blameworthiness requires an individual to possess capacity for responsible agency. In other words, D knew what he was doing when he committed the offence under s76, and exercised choice and a sufficient degree of control in doing so.²³ Blameworthiness, in the context of lying and deceiving, is analysed in terms of the harm caused to the victim and the wrongfulness of using lying and deception to control the victim's behaviour. Harm deals with the degree to which the conduct causes, or risks causing a 'significant setback to another's interests'.²⁴ Determining wrongfulness involves examining the extent to which the criminal act involves the violation of a moral norm.²⁵ In the context of intimate relationships, it is not possible to violate a victim's autonomy (wrongfulness), without causing her any harm. The argument in favour of including lying and deceiving as part of 'controlling behaviour' is that such conduct should be understood as involving a violation of the victim's autonomy.²⁶ It is advocated that lying and deceiving are capable of causing harm to a victim by depriving her of independence and controlling her behaviour to the perpetrator's advantage. According to Stark '[n]ot only is coercive control the most common context in which [women] are abused, it is also the most dangerous'.²⁷ The Statutory

²¹ *Ibid* at 3

²² Green, P. S, 'Lies, Rape, and Statutory Rape' in Austin Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (Cambridge University Press, 2015) at 205

²³ Lacey, N, and Packard, H, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 OJLS 665

²⁴ Feinberg, J, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, 1984) at 31-36

²⁵ *Supra* n 22 at 205

²⁶ McGregor, J, 'Force, Consent, and the Reasonable Woman' in J Coleman and A Buchanan (eds), *Harm's Way: Essays in Honour of Joel Feinberg* (Cambridge University Press, 1994) at 231

²⁷ *Supra* n 2

Guidance provides a non-exhaustive list of types of behaviour associated with coercion or control.²⁸ Amongst the types of behaviour, 'isolating a person from their friends and family' can be achieved by lying and deceiving. Examples include lying to the victim that her friends or family have contacted her or falsely informing her that her friends or family no longer wish to have any contact with her. Such behaviour includes deleting calls and messages from the victim's phone.

A Kantian framework will be applied to support the argument that lying and deceiving are a further type of abuse which should be criminalised under s76. Kant argued that the supreme principle of morality is a standard of rationality which he termed the 'Categorical Imperative' (CI).²⁹ The CI has been described as 'an objective, rationally necessary and unconditional principle'³⁰ which must always be followed despite any desires or inclinations to the contrary.³¹ All specific moral requirements, according to Kant, are justified by this principle, which means that all immoral actions are irrational because they violate the CI.³² Kant's moral philosophy deals with ethical duties of the individual moral agent. The CI is based on 'the Idea of the will of every rational being as a will that legislates universal law.'³³ A moral obligation must be universalised, in other words, capable of being applicable to all individuals, at all times and in similar situations.³⁴ Therefore, Kant's philosophy deals with ethical duties of the moral agent and the ability of the moral agent to act with moral rational agency.³⁵ To be autonomous, an individual must be capable of independent moral

²⁸ *Supra* n 18 at 4

²⁹ Kant, I, *The Moral Law: Groundwork of the Metaphysics of Morals* edited H J Paton (Routledge: London 1966), 4:421

³⁰ <https://plato.stanford.edu/entries/kant-moral/>

³¹ *Supra* n 29 at 4:421

³² *Ibid* at 4:421

³³ *Ibid* at 4:432

³⁴ Universalism in Ethics (2004) www.caae.phil.cmu.edu/Cavalier/80130/part2/Routledge/R_Deontology.html

³⁵ *Supra* n 29 at 4:431 93

judgment and decision-making and whose will is directed by their own moral conceptions and rational judgments, free from the influence of others.³⁶ The appeal of Kantian ethics is its commitment to a moral obligation which must be universal and its consideration of whether the moral worth of an act is carried out as a result of a sense of duty or obligation. According to Kant, 'all duties are either duties of right, that is, duties for which external law giving is possible, or duties of virtue, for which external lawgiving is not possible'.³⁷ Kant's principle of morality classifies duties into four categories: duties to oneself and others, and perfect and imperfect duties. Perfect duties are prohibitions of specific types of actions, and violating them is morally blameworthy. Imperfect duties are recommendations of certain acts, and adhering to them is morally praiseworthy. A crucial element of Kantian ethics to support the argument that lying and deceiving are capable of controlling an individual, is his claim that a rational will cannot act except 'under the Idea' of its own freedom.³⁸ Kant considers freedom to be the main value to individuals. Coercion is only permitted where it is essential to protect freedom. After first exploring the meaning of the terms lying and deceiving, the article will explore the impact of these behaviours upon a victim's autonomy illustrating that such conduct restricts freedom and manipulates an individual, by depriving her of 'the means needed for independence'. Used in this manner the behaviour amounts to controlling behaviour and ought to be construed as such for the purposes of criminalisation under s. 76.

³⁶ Christman <https://plato.stanford.edu/entries/autonomy-moral/>

³⁷ *Supra* n 29 at 6:239

³⁸ *Supra* n 29 4:448 108

Deception

Alexander and Sherwin describe deception as encompassing an unlimited variety of methods by which the deceiver creates false impressions in another's mind.³⁹ The term is used in this article to refer to the communication⁴⁰ of a message⁴¹ that is intended to mislead.⁴² Deception, unlike lying, need not be directed at a specific individual. Examples of indirect deceptions include where the deceiver removes his wedding ring to mislead others about his marital status or where he gives the impression that he is a footballer or film producer.⁴³ Deception includes actions, omissions, words and strategic silences.⁴⁴ It is recognised that deception is an element of many forms of acceptable social behaviours, such as tact, politeness or evasion.⁴⁵ In the context of intimate relationships, parties rarely disclose every potentially relevant detail.⁴⁶ There are a variety of methods by which one can tacitly mislead. According to Adler, 'deception need not be intentional or voluntary, as lying must'.⁴⁷ However, he concedes that both lying and deception aim for the victim to believe falsely.⁴⁸

Lying

Although a universally accepted definition of lying does not exist, Isenberg has suggested it is a 'statement made by one who does not believe it with the intention that someone else

³⁹ Alexander, L, and Sherwin, E, 'Deception in Morality and Law' (2003) 22 Law and Philosophy 393 at 400

⁴⁰ 'Communication' can be direct or indirect.

⁴¹ Words and conduct.

⁴² Green, P. S, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press 2007) at 76

⁴³ *R v Melitti* [2001] EWCA Crim 1563

⁴⁴ *Supra* n 39 at 400

⁴⁵ Adler, J, E, 'Lying Deceiving, or Falsely Implicating' (1997) 94 Journal of Philosophy 435 at 435

⁴⁶ Rubinfeld, J, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 The Yale Law Journal 1372 at 1372

⁴⁷ *Supra* n 45 at 435

⁴⁸ *Supra* n 46

shall be led to believe it'.⁴⁹ This definition requires further clarification to fully distinguish it from deception. Green has noted that lying involves a much narrower range of behaviours than deception generally.⁵⁰ Deception, as shown above, includes a variety of methods by which the deceiver produces false impressions in another's mind.⁵¹ Unlike deceptions, lies require an assertion that 'we present ourselves as believing something while and through invoking (although not necessarily gaining) the trust of the one' to whom we assert.⁵²

Lying is viewed as wrong for various reasons. Thomas Aquinas maintained that lying is contrary to the law of nature.⁵³ Kant also viewed lying, which he defined as 'false assertion', to be 'directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts', and the liar 'throws away and, as it were, annihilates his dignity as a human being'.⁵⁴ Kant illustrates the absolute character of the moral imperative not to lie by giving the example of lying to the murderer at the door who asks about the whereabouts of his intended victim.⁵⁵ Lying is wrong because it violates autonomy by forcing an individual to pursue the speaker's objectives, rather than her own preferences.⁵⁶ Lying asserts what the perpetrator believes to be false.⁵⁷ Deceptions, on the other hand, are invitations by the perpetrator to accept as true his deceptive behaviour.⁵⁸ In his treatment of the false promise case, under the Formula of Humanity, Kant explained that the victim of the lie would not agree to being used to the advantage of the false promisor and 'cannot

⁴⁹ Isenberg, A, 'Deontology and the Ethics of Lying' in Callaghan, Cauman, L, W, Mothersill, S, *et al* (eds), *Aesthetics and Theory of Criticism: Selected Essays of Arnold Isenberg* (University of Chicago Press, 1973) at 248; for an alternative definition see Alexander and Sherwin, *supra* at n 39

⁵⁰ *Supra* n 42 at 77

⁵¹ *Supra* n 39 at 400.

⁵² Simpson, D, 'Lying, Liars and Language' (1992) 52 *Philosophy and Phenomenological Research* 623 at 625

⁵³ Aquinas, T, *Summa Theologiae* (McGraw-Hill, 1972, Vol. 4).

⁵⁴ Kant, I, *The Metaphysics of Morals* (Mary Gregor tr: Cambridge University Press, 1996) at 182

⁵⁵ Kant, I, 'On Supposed Right to Tell Lies from Benevolent Motives' in Abbott, T,K, (ed and trans), *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics* (Dover Publications, 1989) at 36

⁵⁶ Strauss, D, A, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 *Columbia LR* 334 at 355

⁵⁷ Siegler, F, A, 'Lying' (1966) 3 *American Philosophical Quarterly* 128 at 130

⁵⁸ *Supra* n 42 at 77

contain the end of this action in himself.’⁵⁹ Kant’s treatment of the false promisor can be equally applied to all forms of deception, including Herring’s example of the rogue who falsely proclaims his love,⁶⁰ to show that deceptions violate autonomy. Autonomy is violated because there is lack of reciprocity between the parties.

S76 and protecting autonomy

The wording of the Government’s statutory guidance framework on controlling behaviour clearly shows that it is designed to cover acts which negatively impact on a person’s decision-making process, by influencing their will in a manner which deprives them of independence and regulates their behaviour in way which is to the perpetrator’s advantage. Since independence is synonymous with freedom, Tadros notes that a ‘particular kind of freedom is often undermined by domestic abuse’.⁶¹ According to Tadros:

It is common for victims of domestic abuse to fail to recognise that there are options available to them to move from the abusive relationship... the wrong done through domestic abuse is not just that the defendant denies the victim options, but also that he denies her the freedom to recognise and exploit the options that she has.⁶²

To determine how lying and deceiving restrict a victim’s freedom, the value of autonomy needs to be examined. Despite the various conceptions of autonomy,⁶³ the core essence of autonomy is the argument that each individual should be able to choose how to live her life,

⁵⁹ Kant, I, *The Moral Law*, (H J Paton tr: Hutchinson & Co, 1969) at 4:426

⁶⁰ Herring, J, ‘Mistaken Sex’ [2005] *Criminal Law Review* 511 at 511

⁶¹Tadros, V, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’ (2005) *Louisiana Law Review* 65(3) 989 at 996

⁶²*Ibid* at 999

⁶³ Dworkin, G, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988)

as long as others are not harmed.⁶⁴ Autonomy is synonymous with a concept of self-governance and is characterized by self-sufficiency and independence.⁶⁵ By viewing autonomy as composed of various elements rather than a single entity to choose one's own path, the concept of autonomy applied in this article is one which focuses on securing for individuals the right to self-determination. Green adopts a similar approach in relation to sexual autonomy where he argues that it is 'loosely analogous to the concept of property',⁶⁶ which is characterised as a 'bundle of rights'.⁶⁷

According to the principle of individual autonomy, individuals should be treated as responsible for their own actions.⁶⁸ This principle includes factual and normative elements which will be explored to determine which elements autonomy should include. The factual element of autonomy is that individuals have the capacity and free will to make meaningful choices.⁶⁹

Under the normative element, individuals should be respected and treated as capable of choosing their actions.⁷⁰ The normative element assists in determining whether a duty exists to disclose information which, if withheld, negatively affects the victim's autonomy by depriving her 'of the means needed for independence' or regulating her 'everyday behaviour'. Applying Dworkin's principle that individuals are entitled to equal concern and respect,⁷¹ allows us to examine the role of the state in relation to protecting individual

⁶⁴Herring, J, 'Relational Autonomy and Rape' in Sclater, S,D, Ebtehaj, F, Jackson, E, and Richards, M, eds., *Regulating Autonomy* (Hart, 2009) at 54

⁶⁵ Fineman, M, 'The Social Foundations of Law' (2005) 54 Emory Law Journal 224

⁶⁶Becker, L,C, *Property Rights: Philosophic Foundations* (London: Routledge, 1980), 11-21; Jenner, J,E, 'The "Bundle Of Rights" Picture Of Property' (1996) 43 UCLA Law Review 711

⁶⁷ *Supra* n 22 at 206

⁶⁸ Ashworth, A, and Horder, J, *Principles of Criminal Law* (Oxford: OUP, 2009) at 23

⁶⁹ *Ibid* at 23

⁷⁰MacCormick, D, N, *Legal Rights and Social Democracy: Essays In Legal And Political Philosophy* (Oxford: Oxford University Press 1982) at 23

⁷¹ Dworkin, R, *Taking Rights Seriously* (Gerald Duckworth & Co: London 1977) at 180

autonomy. Protecting autonomy attaches great importance to 'liberty and individual rights in any discussion of what the State ought to do in a given situation'.⁷² Thus, the State should allow individuals to decide for themselves when and with whom to engage in an intimate relationship.

Autonomy has been described as comprising of two aspects: positive and negative.⁷³ Positive autonomy involves freedom from restraints and freedom to achieve self-realisation.⁷⁴ This is limited in so far as individuals exercise it provided their freedom does not impact on the freedom of others. Thus, in a liberal society significant limitation will be placed to ensure that certain rights do not encroach or conflict with the rights of others. Negative autonomy, on the other hand, is freedom from interference by external forces. While positive autonomy deals with an individual's right to choose, negative autonomy concerns the right to refuse.

Protecting autonomy

Although lying and deceiving are capable of depriving individuals from the means needed for independence and regulating their behaviour, the definitions do not provide a reason as to why there should be a duty, in an intimate relationship, for the parties not to lie or disclose material information to one another. Kantian ethics will be applied to support the argument that individuals, in an intimate relationship, owe a mutual duty of care and respect.

⁷² *Supra* n 68 at 24

⁷³ Elliott, C, and de Than, C, "The Case for a Rational Reconstruction of Consent in Criminal Law" (2007) 70(2) M.L.R. 22, 231

⁷⁴ *Supra* n 42 at 207

In the context of intimate relationships, controlling behaviour undermines individual autonomy by ignoring the duty of respect and care owed to the victim. For Kant, individuals deserve respect because they possess 'autonomy of the will'.⁷⁵ This concerns an individual's capacity, as a rational being, to choose principles which accord with standards which she sets for herself.⁷⁶ Allowing individuals to exercise their freedom to choose from a set of options requires respecting the fact that they are rational beings:

The respect I have for others or that another can require from me... is therefore a recognition of dignity... in other human beings, that is, of a worth that has no price, no equivalent for which the object evaluated... could be exchanged.⁷⁷

Showing respect for individuals requires respecting their autonomy which involves their ability shape their lives by making choices, free from external manipulation. Therefore, 'autonomy of the will' is the dignity which each individual possesses and requires respect. Lying and deceiving impact on an individual's autonomy because they limit her ability for self-determination.

Kantian autonomy

Although autonomy nowadays is associated with individual wishes and desires,⁷⁸ Kantian autonomy is used in this article because '[t]o be autonomous...is emphatically not to be able to do or have whatever one desire, but rather it is to have the capacity for rational

⁷⁵ *Supra* n 29 at 4:440

⁷⁶ Hill, T, E, "The Kantian Conception of Autonomy" in *Dignity and Practical Reason in Kant's Moral Theory* (Ithica: Cornell University Press 1992), 76-96

⁷⁷ *Supra* n 54 at 6:462

⁷⁸ Mclean, S, *Autonomy, Consent and the Law* (Routledge-Cavendish: Abingdon, 2010) at 14

governance’.⁷⁹ Oshana criticises the Kantian approach for being essentially unhelpful because it is ‘premised on a strict adherence to impartial and abstract principles, or a conception that discounts the roles that emotion and partiality play in our moral development and moral choices, is implausible and unnecessary’.⁸⁰ Despite this criticism, Kant’s philosophy is ‘manifested in a life in which duties are met, in which there is respect for others and their rights, rather than a life liberated from all bonds’.⁸¹ It is specifically the focus on duties of respect and principles of obligation, which makes Kantian autonomy ideal in relation to protecting autonomy in intimate relationships.

Kant’s main thesis in the *Groundwork* is that:

The moral worth of an action does not lie in the effect expected from it and so too does not lie in any principle of action that needs to borrow its motives from this expected effect.⁸²

The moral worth of an act is related to both the outcome it brings and to whether it is carried out as a result of a sense of duty or obligation. Duty is described as ‘the action to which someone is bound’.⁸³ All duties, according to Kant, ‘are either duties of right, that is, duties for which external law is possible, or duties of virtue, for which external law giving is not possible’.⁸⁴ He divides duties into ‘perfect and imperfect duties’ to ourselves, and perfect and imperfect duties to others.⁸⁵ Although he does not state which particular

⁷⁹ Downie, R, S, Macnaughton, J, *Bioethics and the Humanities: Attitudes and Perceptions* (Routledge, 2007)

⁸⁰ Oshana, M, ‘The Autonomy Bogeyman’, (2001) *The Journal of Value Inquiry* 35 209 at 212

⁸¹ O’Neill, O. *Autonomy and Trust in Bioethics* (Cambridge University Press: Cambridge 2002) at 83

⁸² *Supra* n 29 at 4:401

⁸³ *Supra* n 29 at 4:401

⁸⁴ *Supra* n 54 at 6:239

⁸⁵ *Supra* n 29 at 4:421

perfect duty to others he has in mind, Mahon argues that the perfect duty to others he has in mind is the perfect duty to others not to lie to others.⁸⁶

Lying and deceiving: violation of care

In addition to respecting the dignity of others as autonomous agents, Kantian ethics contains two sets of duties: perfect and imperfect. These involve the duty towards others in terms of respect and love.⁸⁷ Kant's supreme principle of morality, the Categorical Imperative (CI), commands that individuals:

Act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a means but always at the same time as an end.⁸⁸

The above formula imposes both negative and positive duties on individuals in relation to the treatment of others.⁸⁹ The negative aspect occurs when we do not interfere with the ends of others. Individuals are treated as ends, in the positive sense, when we attempt to assist them in attain their (legitimate) ends.⁹⁰ According to Kant:

All duties are either 'duties of right, that is, duties for which external lawgiving is possible, or duties of virtue, for which external lawgiving is not possible.⁹¹

The CI imposes a moral obligation to respect others. A morally right action is one which expresses respect for an individual as an end in herself as opposed to a mere means for the

⁸⁶ Mahon, J, E, 'Kant and the Perfect Duty to Others not to Lie' (2006) *British Journal for the History of Philosophy* 14(4) 653 at 661

⁸⁷ *Supra* n 54 at 6:448 and 6:462

⁸⁸ *Supra* n 29 at 4:429

⁸⁹ Cummiskey, D, *Kantian Consequentialism*, (Oxford University Press: Oxford, 1996) at 141

⁹⁰ *Ibid*

⁹¹ *Supra* n 54 at 6:239

sole benefit of another. By contrast, a morally wrong action is one which expresses disrespect by not valuing the victim as an end in herself.⁹² The rational nature of individuals constitutes the supreme limiting condition of the freedom of action of every human being.⁹³ The importance of this directive is that it places a limit on the freedom of individuals in terms of how they treat others, namely not to treat them only as a means but rather as ends in themselves. From the vantage point of pure reason, the CI directs one as to what ought to be done in an intimate relationship, and lying and deceiving are contrary to the CI.

In the context of intimate relationships, individuals must not treat others to further their own self-interests but should treat others as beings, worthy of respect and dignity. However, it is not wrong to treat individuals as a means to our ends. What is prohibited under the CI is treating others as mere means to our ends, to treat them as if the only value they have is what derives from their usefulness to us. O'Neill argues that Kant's requirement of treating others as ends in themselves 'demands that Kantians... act to support the possibility of autonomous action where it is most vulnerable'.⁹⁴ Although O'Neill's argument is in relation to a Kantian duty to work to reduce hunger and poverty, her analysis applies equally coercive control in that it concerns owing a duty to assist those who are vulnerable (in a controlling environment) or whose autonomy is at risk. Therefore, Kantian ethics imposes a duty on individuals to promote the autonomy of others.

Treating lying and deceiving, in intimate relationships, as a violation of respect, risks missing out on another important violation, the duty of care. While it is true the exact component of care varies between intimate relationships, a common duty exists in that individuals have a

⁹² Wood, A, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999)

⁹³ *Supra* n 29 at 4: 431

⁹⁴ O'Neill, O, 'Ending World Hunger' in Aiken, W, and LaFollette, H, (eds) *World Hunger and Morality*, (Prentice-Hall Inc., 1996) 95-111

duty to care for and about each other.⁹⁵ Thus, the importance of the duty of care in intimate relationships is that it allows each partner to exercise their autonomy in a manner which is consistent with their ends. Care manifests itself as either psychological or practical support.⁹⁶ Psychological support includes providing assurance to one's partner when she has doubts or fears about achieving a particular end, such as feeling isolated from family and friends. Supporting another while they are undergoing medical treatment, is an example of practical care. Lying and deceiving in an intimate relationship risk depriving the victim of the standard of care expected from such a relationship. The perpetrator's violation of the duty of care is inconsistent with Kant's moral theory, because he has failed to treat his victim as an end in herself. Using lying and deceiving also allow the perpetrator to exercise control over his victim by limiting the options available to her.

Applying Kantian ethics to personal relationships, it can be argued that duties in personal relationships are different from general duties to others, because respecting autonomy might well require we perform some actions for those we know well which we would not perform for strangers.⁹⁷ The formula of humanity (FHE) requires individuals to provide special consideration to those in personal relationships because those relationships are ends which they have.⁹⁸ Being in a personal relationship with another usually involves being involved in her life plan, therefore, there is a requirement attached to treat her in a way that takes those facts into account.

⁹⁵Manning, R, *Speaking from the Heart: A Feminist Perspective on Ethics* (Lanham, Maryland: Rowman & Littlefield Publishers, 1992); Miller, S,C, 'A Kantian ethic of care?' in Andrew, B, Keller, J, Schwartzman, L (eds) *Feminist interventions in ethics and politics: feminist ethics and social theory* (Rowman & Littlefield Publishers, 2005); Noddings, N, *Caring: A Feminine Approach to Ethics and Moral Education* 2nd ed. (Berkley University of California, 2003)

⁹⁶Bramer, M, 'Domestic Violence as a Violation of Autonomy and Agency: The Required Response of the Kantian State' (2011) 27 *Social Philosophy Today* 97 at 102

⁹⁷Bramer, M, 'The Importance of Personal Relationships in Kantian Moral Theory: A Reply to Care Ethics' (2010) *Hypatia* 25(1) 121, 18

⁹⁸ *Ibid* at 19

Miller argues that through ‘the principle of beneficence, Kant provides the grounds upon which to establish *that* one must respond to the needs of others’.⁹⁹ In other words, acting in a way consistent with care ethic is required by Kantian moral theory. According to Held, care involves:

[A]ttentiveness, sensitivity, and responding to needs. Needs are of innumerable subtle emotional and psychological and cultural kinds, as well as of completely basic and simple kinds, such as for sufficient calories to stay alive.

Kantian moral theory requires individuals to treat each other in a way that is consistent with their relationship and in a way that shows that those individuals consideration.¹⁰⁰ The above analysis, can be equally applied to intimate relationships in that individuals are required to be attentive to their partners’ needs. Lying and deceiving for the purpose of using another individual as a mere means, is clearly inconsistent with Kantian moral theory, because the FHE requires individuals to act in a way that promotes the ends of others.

Kantian autonomy involves care in the treatment of others. Bramer notes that ‘[t]he that partners provide to each other allows each partner to exercise his or her autonomy and agency’.¹⁰¹ She argues that, understood correctly, Kantian moral theory requires individuals to provide special consideration to family and friends.¹⁰² The CI in the form of the FHE¹⁰³ does not instruct individuals on which action is the right action but rather what kind of action is the right action. Thus, by performing an action which shows respect for the agent,

⁹⁹ *Supra* n 95 at 154

¹⁰⁰ *Supra* n 97 at 22

¹⁰¹ *Supra* n 96 at 102

¹⁰² *Supra* n 97 at 5

¹⁰³ ‘Act in such a way that you treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end’ *Supra* n 29 at 4:429

individuals are more likely to take into account particular details about that particular person.¹⁰⁴ Bramer's analysis can be contrasted with Stark's interpretation of the FHE. Stark claims the impartiality of Kantian theory provides a standard of rightness rather than a way to determine which action is right.

However, while it is true, on Kant's account, that I must respect others because they are rational agents, it does not follow that in respecting them I must pay attention only to their rational agency. Indeed, in most cases it would be impossible to fulfil one's obligation to respect someone without attending to her particular situation: her needs, concerns, aspirations and personal history.¹⁰⁵

It is incorrect to view Kant's theory of obligations purely based on impartiality which results from individuals being rational agents. As noted by Bramer, 'understood correctly, Kantian moral theory not only allows but *requires* that we give special consideration to family and friends.'¹⁰⁶ This claim is supported by Kant's claim that:

For in wishing I can be equally benevolent to everyone, whereas in acting I can, without violating the universality of the maxim, vary the degree greatly in accordance with the different objects of my love (one of whom concerns me more closely than the other).¹⁰⁷

Kant recognises that spouses have obligations to each other due to their relationship. The FHE instructs individuals to give special consideration to spouses because of their

¹⁰⁴ *Supra* n 97 at 8

¹⁰⁵ Stark, C, 'Decision procedures, standards of rightness, and impartiality' (1997) *Nous* 31(4) 478 at 483-484

¹⁰⁶ *Supra* n 97 at 5

¹⁰⁷ *Supra* n 54 at 6:452

relationship to us. In his discussion of the FHE, Kant contends that rational nature is an end in itself,¹⁰⁸ and ends are goals which rational agents set for themselves, which they intent to achieve.¹⁰⁹ According to Kant, rational beings are ‘objects of respect’¹¹⁰, and therefore, to treat a rational agent as an end is to show respect for her capacity to set ends for herself and to act on those grounds. Lying and deceiving, when used to manipulate an individual, risk treating that individual as a mere means and failing to respect her capacity to set goals for herself.

By ‘humanity’, Kant means the power of free rational choice, for ‘the capacity to propose an end to oneself is the characteristic of humanity’.¹¹¹ The FHE requires that we treat humanity as an end and never merely as a means in order to achieve respect for the dignity of humanity. Kant describes an ‘end’ as an object of free choice.¹¹² The words ‘at the same time’ and ‘simply’¹¹³ must not be overlooked when analysing the meaning of this formula. The FHE does not forbid individuals from using others as a means. For example, every time a person borrows a library book, he is using the librarian as a means, but he does not use the librarian simply as a means. What he expects from the librarian is in accordance with his duty and his own will. What is forbidden by the FHE is failing to treat a person ‘at the same time as an end’. This implies that the injunction to treat individuals ‘never merely as a means’ is redundant. In order to comply with the FHE, a person must treat others as ends. What Kant has in mind when he instructs that a person must never use herself or others ‘simply as a means’, is that they must not be used as means to the attainment of ends based

¹⁰⁸ *Supra* n 29 at 4:429

¹⁰⁹ *Ibid* at 4:428

¹¹⁰ *Ibid* at 4:428

¹¹¹ *Ibid* at 4:412

¹¹² *Supra* n 54 at 189

¹¹³ *Ibid* at 189

on inclinations or to the satisfaction of inclinations.¹¹⁴ Showing respect towards others, does not merely involve respecting an individual's ability to set ends for herself and act on those principles. Respecting others requires concerns for their physical and emotional wellbeing.¹¹⁵

Lying and deceiving: breach of trust

O'Neill notes that '[t]he advantage of grounding rights in obligations can be secured only if good arguments for central human obligations can be found'.¹¹⁶ For Kant, autonomy is a matter of acting on principles of obligation.¹¹⁷ O'Neill's interpretation of Kantian ethics combines the notion of autonomy with the notion of trust.¹¹⁸ This approach is capable of condemning lying and deceiving because they undermine the trust an individual has placed in another. According to O'Neill:

Kant's arguments are designed to show that... by establishing that a range of very fundamental principles *cannot* be 'willed as a universal law': those who adopt them find that they cannot coherently will (even hypothetically) that all others adopt the same.¹¹⁹

This interpretation applies, which applies Kant's FHE,¹²⁰ condemns lying and deceiving because the perpetrator, in lying about his identity in order to manipulate his victim, treats her as a means by limiting restricting her freedom of choice. Boyling's victim was

¹¹⁴ *Supra* n 29 at 4:437

¹¹⁵ Hill, T.E, *Human Welfare and Moral Worth* (New York, Clarendon Press 2002) at 77

¹¹⁶ *Supra* n 81 at 83

¹¹⁷ Kant, I, *Critique of Practical Reason* (1785) trans Mary Gregor, in *Kant, Practical Philosophy*, (Cambridge University Press, 1996) 5:33 19-16

¹¹⁸ *Supra* n 81 at 83

¹¹⁹ *Supra* n 81 at 86

¹²⁰ 'act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means' from Kant, I, 'Groundwork of the Metaphysics of Morals, trans H.J. Paton (New York: Harper & Row, 1964) at 4:429

manipulated into entering in a relationship with him. Kant's principle of universability demands that individuals act only on principles that they can view as principles for all. An individual who adopts a principle of control must also will some effective means of control.¹²¹ Therefore, an individual who wills a principle of control as a universal law must also will that everybody uses some form of control. However, it is not possible to adopt a universal principle of control because those applying the control are, as Kant points out, make an exception for themselves:

If we now attend to ourselves whenever we transgress a duty we find that we do not in fact will that our maxim should become a universal law – some this is impossible for us – rather that its opposite should remain a law universally: we only take the liberty of making an exception to it for ourselves or even just for this once.¹²²

A commitment to adopting principles that others adopt, rejects lying and deceiving due to the fact that it cannot be universalised for all. It follows that any principle of action whose universal adoption would undermine capacities for action for some cannot be willed as a universal law.¹²³ A second ground for supporting the claim that lying and deceiving negate trust, is Kant's maxim that individuals should never lie, whatever the consequences.

Lying and Deception of undercover police officers

It has been explained above how a Kantian approach provides a moral framework to illustrate that lying and deceiving used within an intimate relationship can be particularly

¹²¹ Lying and deceiving

¹²² *Supra* n 29 at 4:424

¹²³ *Supra* n 81 at 88

harmful to a person in receipt of the behaviour. Furthermore, Kantian ethics extends beyond the individual and imposes an obligation on the State to ensure that autonomy is protected within intimate relationships. Before, analysing this aspect of Kantian theory, it is useful to provide a contemporary example of lying and deceiving used to create and maintain intimate relationships to highlight the involvement of the state. A number of undercover-police officers entered into intimate relationships with female members of environmental, anarchist and left-wing groups that were listed by the Special Demonstration Squad (SDS) as potentially dangerous.¹²⁴ Exploring the case of *AJA & Ors v Commissioner of Police for the Metropolis*¹²⁵ illustrates the very real harm felt by the victims as a result of both the direct behaviour of the individual officers concerned and the endorsement of such behaviour by the state itself. It is contended that were such practices to be repeated following the enactment of s. 76 SCA 2015, the officers ought to face prosecution.

In *AJA & Ors v Commissioner of Police for the Metropolis*, the Crown Prosecution Service (CPS) halted criminal proceedings against six defendants who had been due to stand trial at Nottingham Crown Court on charges related to a conspiracy to sabotage a coal-fired power station at Ratcliffe-on-Soar. The CPS was concerned that Nottinghamshire Police had failed to comply with their pre-trial disclosure obligations relating mainly to the work of undercover police officer, Mark Kennedy.¹²⁶ It later emerged that PC Kennedy had had at least one long-term, intimate sexual relationship with a woman involved with one of the

¹²⁴ An undercover unit of Greater London's Metropolitan Police Service, established in 1968, to infiltrate British protest groups.

¹²⁵ *AJA & Ors v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 W.L.R. 285

¹²⁶ *Ratcliffe-on-Soar Power Station (Operation Aeroscope) Disclosure*, Final Report of an Independent Investigation by the Independent Police Complaints Commission, IPCC Reference: 2011/000464 (2012).

groups he had infiltrated. Following this discovery, allegations concerning undercover police officers acting beyond their authorisation, or taking action which was authorised but should not have been, were reported in the media.¹²⁷ It was claimed that several officers had intimate relationships with members of the groups they had infiltrated. An investigation by the Guardian shed light on the conduct of other undercover police officers such as Andre James Boyling,¹²⁸ Mark Jenner¹²⁹ and Bob Lambert.¹³⁰ In December 2011 eight women launched legal action against the Metropolitan Police for the harm caused by undercover officers deceiving them into long term intimate relationships. The victims claimed that the undercover police officers breached their human rights, subjecting them to inhumane and degrading treatment,¹³¹ and disrespecting their private and family life.¹³² The women also brought claims for deceit, assault, misfeasance in public office and negligence.

In February 2013, the Home Affairs Committee invited the women involved to give evidence. One witness explained that:

How it feels to me is that it is not having found out that your partner was lying about who they are; it is finding out that your most personal relationship was being controlled by the state without your knowledge.¹³³

¹²⁷ 'Police publish secret training manual telling undercover cops to have 'fleeting, disastrous' affairs with targets' *The Mirror* 1 July, 2015; 'Undercover operations "totally outside the bounds of a civilised society" – lawyer' *The Guardian* 20 December, 2011

¹²⁸ 'Undercover policeman married activist he was sent to spy on' *The Guardian* 19 January, 2011

¹²⁹ 'Police spies: in bed with a fictional character' *The Guardian* 1 March, 2013

¹³⁰ 'Ex-undercover officer who infiltrated political groups resigns from academic posts' *The Guardian* 23 December, 2015

¹³¹ European Convention on Human Rights 1950, Article 3

¹³² European Convention on Human Rights 1950, Article 8

¹³³ House of Commons – Home Affairs Committee, *Undercover Policing: Interim Report*, HC 837 (Thirteenth Report of Session 2012 – 13), (TSO 2013)

Another woman who had a child with an undercover police officer stated, 'We are psychologically damaged; it is like being raped by the state. We feel that we were sexually abused because none of us gave consent.'¹³⁴ It is clear that the victims would not have engaged in intimate relationships with the undercover police officers had they known their true identities.¹³⁵ In terms of emotional attachment, Kennedy's conduct appears, to be different to that of Boyling, Jenner and Lambert. These men developed a long-term relationship with the female activists they were assigned to spy on. Jenner cohabited with his partner for a period of five years, while Lambert had a child with his victim. With regards to Boyling, he married the activist and had two children with her.

In relation to criminal proceedings, the CPS considered whether there was sufficient evidence to allow charges of rape, indecent assault, procuring a woman to have sexual intercourse by false pretences, misconduct in public office and breaches of the Official Secrets Act. On 21st August 2014, the CPS confirmed that:

Having carefully considered all the available evidence, provided at the end of a thorough investigation, we have determined that there is insufficient evidence for a realistic prospect of conviction for any offences against any of the officers. Investigators from Operation Aubusson have confirmed that no further lines of enquiry are available at this time.¹³⁶

On the 20th November 2015, the Metropolitan Police gave a full apology, conceding that they had abused the women's human rights, as part of a settlement:

¹³⁴ *Ibid*

¹³⁵ In response to the public outcry concerning the conduct of the undercover police officers, the College of Policing in November 2013, announced that undercover officers will no longer be allowed to engage in sexual relationships with targets.

¹³⁶ <http://blog.cps.gov.uk/2014/08/charging-decision-concerning-mps-special-demonstration-squad.html>

[I]t has become apparent that some officers, acting undercover whilst seeking to infiltrate protest groups, entered into long-term intimate sexual relationships with women which were abusive, deceitful, manipulative and wrong.¹³⁷

The behaviour acknowledged would therefore amount to continuous lying and deceiving, which has been argued above to amount to controlling behaviour. The victim's evidence clearly illustrates that the deception and lying adversely affected their daily lives, undermining their autonomy. Bok argues that victims 'who learn that they have been lied to in an important matter – say, the identity of their parents, the affection of their spouse, or the integrity of their government – are resentful, disappointed, and suspicious'. She contends that victims 'feel wronged' and 'see that they were manipulated, that the deceit made them unable to make choices for themselves according to the most adequate information available, unable to act as they would have wanted to act had they known all along'.¹³⁸ Thus, when a deception is successful, it can provide power to the deceiver, and therefore, can be coercive.¹³⁹ The power afforded to the deceiver is the ability to control his victim and limit her freedom to make choices according to her own standards. It is this erosion of the victim's freedom which is significant because it takes place through the violation of an expectation of trust.¹⁴⁰

¹³⁷'Claimants in civil case receive MPS apology' *Metropolitan Police* 20 November, 2015

¹³⁸ Sissela Bok, *Lying: Moral Choice in Public and Private Life* (John Spiers: Hassocks, 1978) at 20

¹³⁹ *Ibid* at 22

¹⁴⁰ *Supra* n 61 at 990

Lying and deceiving: violation dignity

Boyling, Jennings and Lambert engaged in long term relationships with their victims, therefore, the deception carried out had the effect of controlling their victims' behaviour over a period of time. It is submitted that the impact on their victims' autonomy is much greater than, for example, Kennedy's victims who were deceived into a brief sexual encounter.¹⁴¹ The harm to autonomy in an intimate relationship is greater because the victim makes choices, not just in relation to sex, about her life which are influenced by the D's lies and deception. Given the fact that the victims were deceived over an extended period of time, and these relationships involved more than simply casual sex, their autonomous choice was incapacitated even more than a casual sexual encounter.

Denial of a victim's dignity and limiting her choices by controlling her behaviour is evidence that the perpetrator is shaping the victim's life choices in a manner which might not be consistent with her own principles. Lying and deceiving could be used in an intimate relationship to shape the victim into what the perpetrator wants.

The deception carried out by Boyling and Lambert influenced their victims into entering into relationships and having children with them, when evidence indicates that they would not have done so had it not been for the deception. For Kant, 'ends' are goals we set ourselves, and 'means' are what individuals use to achieve those 'ends'.¹⁴² Lying and deceiving allow the perpetrator to violate her autonomy by denying that she is an end in herself worthy of respect and has dignity. The victims under consideration were deceived into entering into long terms relationships in order for the undercover officers to continue to spy on the activists. Boyling's deception interfered with his victim's ends (negative duty), because his

¹⁴¹ CrimA 5734/10 *Kashur v. State of Israel* [2012] the perpetrator pretended to be Jewish when the victim enquired about his identity prior to sex. He was convicted of rape by deception.

¹⁴² *Supra* n 29 at 4:429

actions impacted on her freedom by manipulating her choice to enter and remain in an intimate relationship with him.¹⁴³ His conduct also failed to assist her in attaining her ends, because she falsely believed that he was a fellow activist. His lack of respect for his victim is evidenced by his sudden disappearance. It cannot be said that the victims were treated 'at the same time as an end'. They were clearly deceived into entering into relationships to further the purpose of the undercover officers. It is clear that Boying's deception had a profound effect on his victims wellbeing, which made her feel 'like a prostitute; just an unknowing and unpaid one'.¹⁴⁴

Protecting autonomy: Obligations of the Kantian State

Further to the behaviour employed by the undercover officers towards the victims in order to advance their criminal investigations is the apparent endorsement by the state that they received. An example of the encouragement given to the officers by the authorities, include instructions they received to 'try to have fleeting, disastrous relationships' with group members.¹⁴⁵ This addition of state involvement appears to have added substantially to the distress of the victims, illustrated by the quotations above. This section will consider State obligations owed to citizens under a Kantian theory.

A tradition in political philosophy endorses certain lies for the sake of the public good. Plato, for example, used the expression 'noble lies' to describe the story that might be told to citizens to persuade them to accept class distinction and, thereby, safeguard social

¹⁴³ 'Ex-wife of police spy tells how she fell in love and had children with him' *The Guardian* 19 January, 2011

¹⁴⁴ *Ibid*

¹⁴⁵ Special Demonstration Squad Trade Manual, 28 available at <http://www.statewatch.org/news/2015/jul/uk-undercover-operation-herne-sds-tradecraft-manual.pdf>

harmony.¹⁴⁶ Bok, argues that ‘very special safeguards’ are required whenever lies to the public become routine.¹⁴⁷ If it is to be argued that those in government and other positions of trust, such as the police, should be held to the highest standards, the question is what moral framework should be adopted which places a moral obligation on the State to safeguard victims from deceptive conduct. Such a framework also has to limit the perpetrator’s positive autonomy whenever his lying or deceiving risks impacting on his victim’s negative autonomy. In other words, his lying or deceiving amounts to controlling behaviour because they subvert the autonomy his victim and reduce her agency. Thus, social policy needs to contribute to women’s self-sufficiency, rather than undermine it.¹⁴⁸

A Kantian framework is used in this article because it can be applied beyond the individual level. The Categorical Imperative (CI) in the Formula of Humanity (FHE) requires individuals to act in a way that treats humanity at the same time as an end and never simply as a means. An examination of Kant’s Doctrine of Right will assist in shedding light on the duties and responsibilities of the State in protecting the autonomy of its citizens. In his discussion on the general division of duties of right, Kant lists three duties. The first duty requires individual’s to assert their worth in relation to others.¹⁴⁹ The second duty commands not to wrong others even if this would require ceasing to associate with others and ‘shun all society’.¹⁵⁰ The third duty, ‘(If you cannot help associating with them) *enter* into a society with them in which each can seek what is his’, is linked to the second duty in which ‘what

¹⁴⁶ Plato, *The Republic*, edited by Waterfield, R, (Oxford University Press: Oxford, 2008), 389b

¹⁴⁷ *Supra* n 138 at 181

¹⁴⁸ Johnson. M,P, and Leone, J,M, ‘The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey’ International Conference on Personal Relationships, Brisbane, Australia, July 2000 available at <http://www.personal.psu.edu/faculty/m/p/mpj/JFI03.html>

¹⁴⁹ *Supra* n 54 at 6:236

¹⁵⁰ *Ibid* at 6:236

belongs to each can be secured to him against everyone else'.¹⁵¹ Although this may appear to require the State to only protect property, given the phrase 'what belongs to each', it can also be understood as a duty to join with others to create a society to secure just treatment for all.¹⁵² If the current law is to incorporate a Kantian requirement that each individual should be treated as an end in herself, s76 must reflect the fact that lying and deceiving are capable of undermining autonomy and by virtue of them being tools for treating victims as mere means.

In his discussion on role of the State, Kant wrote:

The sum of the laws which need to be promulgated in order to bring about a rightful condition is *public right*. – Public right is therefore a system of law for a people, that is, a multitude of human beings...which, because they affect one another, need a rightful condition under a will uniting them...so that they may enjoy what is laid down as right.¹⁵³

Bramer adopts a Kantian approach regarding the duties of a State to 'secure just treatment for everyone'.¹⁵⁴ The purpose of the State, according to the above quote, is to provide laws which will establish and maintain a 'rightful condition' to govern how individuals treat each other. A right, according to the 'Universal Principle of Right' is, '[a]ny action...if it can coexist with everyone's freedom in accordance with a universal law'.¹⁵⁵ Thus, all actions are right provided they coexist with the freedom of all individuals. The importance of the universal

¹⁵¹ *Ibid* at 6:237

¹⁵² Holtman, S, 'Kantian Justice and Poverty Relief' (2004) *Kant-Studien*, 88-106

¹⁵³ *Supra* n 54 at 6:311

¹⁵⁴ *Supra* n 96 at 105

¹⁵⁵ *Supra* n 54 at 6:230

principle of right is that it secures humanity's sole innate right: the right to freedom.¹⁵⁶ In other words, individuals are free to act in any way they see fit, provided their actions do not interfere with the freedom of others. Kant defines an innate right '[f]reedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law'.¹⁵⁷ Lying and deceiving, therefore, are morally wrong because they allow the perpetrator to interfere with the freedom of another. Since lying and deceiving negatively impact on the freedom of another, the State, which exists to maximise individual freedom, can use coercion as a means to limit the freedom of perpetrators under certain conditions. According to Kant:

[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.¹⁵⁸

The above imposes an obligation on the state to make laws which limit a perpetrator's freedom to lie or deceive, as long as the purpose of those laws is to promote freedom generally.¹⁵⁹ The undercover officers engaged in lying and deceiving which affected the freedom of their victims. A Kantian framework provides a justification for the state to enact laws against conduct, such as lying and deceiving, which allows perpetrators to negatively affect the freedom of others.

¹⁵⁶ Carey, M, 'Redistribution, Freedom, and Independence' (2006) vol 1 The Mudd Journal of Ethics 7 at 7

¹⁵⁷ *Supra* n 54 at 6:237

¹⁵⁸ *Ibid* at 6:231 emphasis added in the original

¹⁵⁹ *Supra* n 96 at 105

Objections to Kantian autonomy

Kantian autonomy has become associated with a:

[M]oral superstar alone on a rock of rational will power, removed from the individuals whose this will requires him (Kant's hero is clearly conceived as male by Kant himself) to respect, relying on himself, with no "taint" of love or emotion spoiling his moral glory.¹⁶⁰

This criticism is aimed at Kant's view that an individual should be able to stand alone and be independent of determination of 'alien causes' and possessing a will that is a 'law to itself'.¹⁶¹ Kant's moral individual is said to be devoid of compassion but committed to principles and the duties that stem therefrom.¹⁶² This depiction of the autonomous individual is unappealing to feminists who see an important place for care and sympathy in the nature of moral character.¹⁶³ Kantian autonomy is often viewed by feminists to be a thoroughly masculinist ideal on the basis that it is premised on an 'abstract individualism that portrays the paradigm moral agent as isolated, nonsensical, and ahistorical'.¹⁶⁴

It is submitted that Kant's remarks in relation to sex, marriage and prostitution are often ridiculed¹⁶⁵ and to some extent this is a stance well-justified, given Kant's prudish and

¹⁶⁰ Kneller, J, 'The Aesthetic Dimension of Kantian Autonomy' in R. M. Schott (ed), *Feminist Interpretations of Immanuel Kant* (Pennsylvania State University Press, 1997) at 174-75

¹⁶¹ *Supra* n 29 at 97

¹⁶² *Supra* n 160 at 175

¹⁶³ *Ibid*

¹⁶⁴ *Ibid*

¹⁶⁵ Richards, D, A, *Sex, Drugs, Death, and the Law: An Essay on Human Rights and Overcriminalization* (Rowman & Littlefield: London, 1986) at 109; Bordo, S, *The Flight to Objectivity* (State University of New York Press: Albany, 1987); Pateman, C, *The Sexual Contract* (Stanford University Press: Stanford, 1988) at 171; Herman, B, "Could It Be Worth Thinking About Kant on Sex and Marriage?" in Antony, L, and Witt, C, (eds.) *A Mind of One's Own* (Westview Press: Boulder, 1993) at 50; Nussbaum, M, "Feminists and Philosophy" in New York Review of Books vol. XLI. 1 (Oct. 20 1994) at 62; Anderson, C, S, and Estes, Y, "The Myth of the Happy Hooker: Kantian Moral Reflections on a Phenomenology of Prostitution" in G French, S, G, Teays, W, and Purdy, L, M, (eds) *Violence Against Women: Philosophical Perspectives* (Cornell University Press: New York, 1998) at 152 - 158

misogynist views. However, his arguments to support the limited circumstances in which he believed sex to be morally permissible contain a strong egalitarian and contractual bend and insist on a strong normative standard of “symmetry” between the two partners concerning the “use” of the other’s body.¹⁶⁶ Thus, while Kant’s views on marriage are conservative, his analysis of the permissibility of marital sex allows for protecting autonomy where lying or deception is used to manipulate another. Since morality is linked to rationality, individuals lose moral worth when lust dictates their choices. Matrimony, according to Kantian ethics, is permissible because it involves the parties granting reciprocal rights over each other.¹⁶⁷ It allows for reciprocal possession of their sexual faculties, ‘each of them undertaking to surrender the whole of their person to the other with a complete right to disposal over it’.¹⁶⁸ Thus, within marriage, individuals are not using each other merely as a means to an end, but are doing so in a broader context of mutual respect. Marital sex takes place within a broader context of individuals freely engaging in a lifelong contractual venture. Marriage places the parties on an equal footing. It is this commitment to mutual reciprocity which should be applied in the context of protecting autonomy in intimate relationships.

Conclusion

This article has argued that lying and deceiving should be included within the typology of abuse in intimate relationships. Lying and deceiving involves violations of autonomy because they negatively impact on a victim’s freedom by limiting her choices. They can be accommodated within the non-exhaustive list, published in the Government’s Statutory

¹⁶⁶ For Kant, of course, it must be two heterosexual individuals only.

¹⁶⁷ Kant, I, ‘The Philosophy of Law’, translated by W. Hastie, in *Morality and Moral Controversies*, (3rd ed) ed by Arthur, J, (New Jersey: Prentice Hall, 1993) at 255

¹⁶⁸ *Ibid* at 255

Guidance Framework, which includes the types of behaviours associated with coercion and control. Adopting a Kantian framework, at both the individual and state levels, allows for such conduct to be criminalised under s. 76. Although the current Statutory Framework does not include lying and deceiving as conduct which is explicitly associated with control, the typology of abuse can be expanded to include lying and deceiving through Kant's Categorical Imperative (CI). The CI imposes an obligation on individuals to treat others always at the same time as an end and never simply as a means. For Kant, lying and deceiving are wrong because they cannot be applied universally. Moreover, Kantian ethics allows the state to restrict the freedom of a perpetrator who uses lying or deception to control his partner because his conduct would negatively impact on her autonomy. The State must, therefore, limit a perpetrator's autonomy, by virtue of s. 76, in cases where his lying or deceiving restricts the freedom of another, in an intimate relationship. Future courts must recognise this form of controlling behaviour in order to safeguard the autonomy of victims.